cestui. It may therefore be supported as an extension of the general doctrine of equitable set-off.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — PROFITS ARISING FROM COMBINATION OF TRUST AND PERSONAL INTERESTS OF TRUSTEE. — The defendant was trustee of the plaintiff group of gas companies with entire control. He also owned a controlling interest in the competing group of companies. A coke manufacturing company needed a market for its by-product gas. By contemporaneous transactions the defendant entered into long-term contracts with it on behalf of the plaintiff companies and sold out his personal holdings in the other companies at an abnormal profit. *Held*, that the plaintiff companies are entitled to an equitable share of the personal profits. *Bay State Gas Co.* v. *Rogers*, 147 Fed. Rep. 557 (Circ. Ct., Dist. Mass.).

That a trustee cannot make use of trust-funds for private profit is fundamental. If he trade or speculate with them, he must account to the *cestui* for gains. *Norris's Appeal*, 71 Pa. St. 106. Only by removal of all temptation of self-interest can trustees' loyalty and prudence to defenseless *cestuis* be assured. 1 PERRY, TRUSTS, 5 ed., §§ 427 *et seq.* Nor can the trustee reap incidental benefit from his office, though the *cestui* himself could never have obtained it. *White* v. *Sherman*, 168 Ill. 589. If he himself act as solicitor or broker for his *cestui*, he gets nothing for his services, though he might have paid others for them. *Broughton* v. *Broughton*, 5 De G. M. & G. 160. He cannot buy up at a discount claims against the estate or incumbrances upon it and pocket the difference. *Rankin* v. *Barcroft & Co.*, 114 Ill. 441. Only Kentucky seems favorably disposed toward any kind of incidental profit. *Bush* v. *Webster*, 72 S. W. Rep. 364. The fiduciary capacity does not, however, disqualify a trustee from making profit in a common or joint enterprise with his *cestui*. *Levi* v. *Evans*, 57 Fed. Rep. 677. But equal zeal must be used in furthering each interest. *Scott* v. *Ray*, 18 Pick. (Mass.) 360. In the principal case single ownership of the combined interests involved a strategic position, intrinsically valuable, which could be realized on by sale of either holding. The profit should therefore be apportioned.

WILLS — JOINT WILLS — REVOCATION. — A and B made a joint will whereby each left his property to the other for life, and at the death of the survivor all the property of both was to go to C. A died. B accepted the decedent's estate, and then made another will revoking the first. *Held*, that C may recover such property from the defendants, to whom B voluntarily transferred it during his life, as he would have been entitled to under B's first will. *Bower* v. *Daniel*, 95 S. W. Rep. 347 (Mo., Sup. Ct.). See NOTES, p. 315.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

RIGHTS OF THE JAPANESE IN CALIFORNIA SCHOOLS. — Much popular discussion has been evoked by a rule adopted on October 11, 1906, by the board of school trustees of San Francisco, which provides that Japanese children shall attend schools set apart for Chinese, Japanese, and Koreans, and excludes them from other schools. In considering whether or not such action violates any rights of the Japanese, it may be well first to look at the question apart from the treaty between the United States and Japan.

It is generally held that local school officials have no power thus to provide for separate schools in the absence of express legislative authority.[1] But in the

[1] Ottawa Board of Education *v.* Tinnon, 26 Kan. 1; Wysinger *v.* Crookshank, 82 Cal. 588.

present case such authority is probably conferred by § 1662 of the Political Code of California of 1903, which provides that "trustees shall have the power to . . . establish separate schools for Indian children and for children of Mongolian or Chinese descent." It can hardly be questioned but that "Mongolian" is used here in its broadest sense and includes Japanese.[1] The question then arises whether the action of the school board, though authorized by the legislature, is violative of any rights of the Japanese under the federal Constitution. The first section of the Fourteenth Amendment secures to all persons, thus including aliens,[2] the equal protection of the laws. It is well established, however, that even in the case of a citizen this clause does not prevent the segregation in public schools of different races.[3] The rights of an alien would not be any greater than those of a citizen. But though different races may be segregated, no race may be accorded better treatment than another. So no constitutional rights of the Japanese have been violated in the present case unless the schools for Japanese and for whites offer the latter greater advantages, or unless there is more than a reasonable difference in their accessibility. The former supposition the evidence at hand seems to negative, but it may be that the Japanese school is unreasonably difficult of access.[4] Even in such a case it will have to be established — though this seems not an insuperable difficulty — that aliens have rights in public property, such as public schools. This last objection would very probably not have to be met in the case of Japanese children born in this country, since they are citizens of the United States.[5] On the other hand, such children have, it is clear, no rights under the treaty.

In making inquiry as to whether any treaty rights of Japanese who were born in Japan have been violated, it may well be noted that there is doubt as to whether the treaty-making power of the United States would justify it in guaranteeing to a foreign sovereign for his subjects a greater right or privilege than citizens of this country possess, — the privilege of exemption from racial segregation in schools. For though no case has arisen in which the treaty-making power has been held to be exceeded,[6] there is a general opinion that it has substantial limits.[7] On the whole, however, it seems probable that it would be held to extend to the case in hand.[8] In a recent article Mr. Edwin Maxey comes to the further conclusion that the treaty actually does guarantee to all Japanese subjects freedom from segregation, and that San Francisco has violated this treaty right. *Exclusion of Japanese Children from San Francisco Schools*, 16 Yale L. J. 90 (December, 1906). The material part of the treaty reads as follows: "in whatever relates to rights of residence and travel . . . the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights . . . [as] native citizens or subjects, or citizens or subjects of the most favored nation."[9] Granting with Mr. Maxey that "rights of residence" include school privileges, it is hard to see how the treaty gives the Japanese any rights that are necessarily violated by the segregation order. This is clear as to the clause that gives them the same rights as have citizens of the United States. And even the citizens of the most favored nation are subject to segregation in our schools. A colored British subject would have to attend the schools for negro children, and a white British child the schools for white children, wherever there is segrega-

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[1] See 2 Encyc. Britannica, 9 ed., 113.

[2] Yick Wo *v.* Hopkins, 118 U. S. 356, 369.

[3] Lehew *v.* Brummell, 103 Mo. 546.

[4] See the report of Secretary Metcalf, which accompanied the President's Message to Congress of December 18, 1906.

[5] *In re* Look Tin Sing, 10 Sawy. (U. S. C. C.) 353.

[6] Butler, Treaty Making Power, § 454.

[7] 2 Northwestern L. Rev. 1; same article in 1893 Am. Bar Ass'n 243. *Cf.* U. S. Rev. Stat. § 709. See Geofroy *v.* Riggs, 133 U. S. 258, 267.

[8] *Cf.* Geofroy *v.* Riggs, *supra*.

[9] 29 U. S. Stat. at L. 848.

tion of negroes and whites. It is merely incidental that Japanese subjects are very generally of the Japanese race; German subjects are generally white, and would have to attend the schools for whites. The whites are segregated as much as the negroes or the Japanese. It must be clear that it is the Japanese as a race, not as subjects of the emperor of Japan, who are segregated, since American citizens of Japanese descent are included as Japanese. To interpret the treaty to stipulate against school segregation of the Japanese as a race, as contrasted with Japanese subjects, would be to adopt a very strained construction which would raise grave questions as to the extent of the treaty-making power. It must be remembered that segregation is not discrimination at all, and cannot fairly be said to be a denial of equal privileges, liberties, and rights, any more than under the Fourteenth Amendment it is a denial of the equal protection of the laws.

AFFIDAVITS IN ATTACHMENT. I. *Raymond D. Thurber.* A summary of the law and collection of authorities on the probative value of affidavits in proceedings for the attachment of property. 7 Bench & Bar 55.

CONTROL OF CORPORATIONS, THE. *Frederick N. Judson.* Maintaining that the most advisable method of controlling corporations is not by forfeiture or suspension of the exercise of the corporate functions, but by enforcing a strict responsibility on the part of the officers and members of the corporations for corporate acts. 18 Green Bag 662.

DIVORCE PROBLEM AND RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, THE. *D. D. Murphy.* After discussing Haddock *v.* Haddock and Atherton *v.* Atherton, contending for more uniform divorce laws. 14 Am. Lawyer 499. See 19 HARV. L. REV. 586.

DO WE NEED A "SALE OF GOODS" ACT IN NEW YORK? *E. Lyman Tilden.* A comparison of the simplicity of the English statute with the complexity and apparent conflict of New York decisions; concluding that a codification of the law of sales is highly desirable. 68 Alb. L. J. 303.

ENTITY THEORY IN CORPORATION LAW, THE. *Anon.* Showing how the fiction of corporate entity is in some cases set aside to prevent injustice. 32 Nat. Corp. Rep. 881. See 20 HARV. L. REV. 78; *ibid.* 223.

EVOLUTION OF THE LAW BY JUDICIAL DECISION. I. *Robert G. Street.* Discussing the responsiveness of all judge-made law to public opinion, enumerating the influences of the Roman law upon the common law, and emphasizing the chaotic condition of the latter. 14 Am. Lawyer 490.

EXCLUSION OF JAPANESE CHILDREN FROM THE PUBLIC SCHOOLS OF SAN FRANCISCO. *Edwin Maxey.* 16 Yale L. J. 90. See *supra.*

FREEDOM OF THE EXECUTIVE IN EXERCISING GOVERNMENTAL FUNCTIONS FROM CONTROL BY THE JUDICIARY. I. *John Campbell.* A Colorado view of the governor's right to declare martial law and suspend the writ of *habeas corpus.* 14 Am. Lawyer 503.

INDEX OF COMPARATIVE LEGISLATION, AN. *W. F. Dodd.* Reviewing the best existing summaries of comparative legislation and making suggestions for the proposed summary to be published by the United States Government. 1 Am. Pol. Sci. Rev. 62.

LAW OF OFFICERS, THE. *Leonard Felix Fuld.* Treating the subject under the headings *de facto* officers and qualifications for office. 14 L. Stud. Helper 266, 329.

LIMITATION OF LIABILITY OF VESSEL OWNERS. *James D. Dewell, Jr.* Pointing out that the owner of a vessel, by moving causes of action against him into the federal district courts, can, in many cases by the aid of federal statutes, lessen his common law liability. 16 Yale L. J. 84.

MOVEMENT FOR AN INTERSTATE ORDER BILL OF LADING. *Anon.* Commenting on the need for reformation of the law of bills of lading and explaining the legal effect of proposed amendments to the federal rate bill. 23 Banking L. J. 866.

NEGRO SUFFRAGE: THE CONSTITUTIONAL POINT OF VIEW. *J. C. Rose.* Discussing the methods by which a large part of the negro population of the South is prevented from voting. 1 Am. Pol. Sci. Rev. 17.

NEWFOUNDLAND FISHERIES' DISPUTE, THE. *Alfred B. Morine.* Explaining the questions at issue, and raising questions as to the construction of the treaty of 1818 which defines the rights of Americans. 5 Can. L. Rev. 414.

NEW YORK MORTGAGES AND THE RECORDING ACTS. *Edgar Logan.* Noting the difficulties of assignees of mortgages under recent conflicting New York decisions. 6 Colum. L. Rev. 547.

ORDINARY AND THE ULTIMATE PURCHASER, THE. *Bernard C. Steiner.* A treatment of the law of unfair competition so far as it relates to the protection of purchasers. 16 Yale L. J. 112.

PEREZ *v.* FERNANDEZ — CONFLICT BETWEEN CIVIL AND COMMON LAW IN OUR NEW POSSESSIONS. *Anon.* Criticizing the decision found in 202 U. S. 80 in which the court went far to continue a difference in procedure. 63 Cent. L. J. 411.

PROVINCE OF THE JUDGE AND OF THE JURY, THE. *G. Glover Alexander.* The historical development. 32 L. Mag. & Rev. 72.

REFORMS IN THE LAW OF FUTURE INTERESTS NEEDED IN ILLINOIS. I. *Albert Martin Kales.* 1 Ill. L. Rev. 311.

THEORY OF THE CASE, THE. *Anon.* Criticizing the tendency of the courts in code states to depart from the issue of the pleadings. 63 Cent. L. J. 395.

II. BOOK REVIEWS.

THE LAW OF RAILROAD RATE REGULATION, with Special Reference to American Legislation. By Joseph Henry Beale, Jr., and Bruce Wyman. Boston: William J. Nagel. 1906. pp. lii, 1285. 8vo.

This work will fill a general demand of the profession for a comprehensive and reliable work covering its subject. It deals with the subject from a broader standpoint than that of the Interstate Commerce Act alone. The authors consider the common law rules, the state statutory regulations, the Interstate Commerce Act, the decisions of the Interstate Commerce Commission, and the decisions of the state and federal courts. The present general demand for such a work is due to the Interstate Act Amendments of 1906, the age of all works on the subject, except those of Snyder and Judson, and the fact that they fail to deal with the common law and state statutes, which are at the very foundation of this subject.

To give sound advice, the common law, the state constitutions and statutes, and the national Constitution and statutes, must often be considered as a whole. Historically and legally, this clearly appears. In 1787 Congress was granted the power "to regulate commerce" (interstate). So far as Congress was concerned, this power remained almost unexercised until a century later, or 1887, when the first Interstate Commerce Act was passed. This act was passed because the attempts of the states to regulate the conduct of railways by the so-called Granger legislation and legislation of that character, in the early seventies, were nullified as to interstate traffic, October 25, 1886, by the necessary ruling of the Supreme Court in Wabash Ry. Co. *v.* Illinois (118 U. S. 557, 577) that regulation of interstate traffic by railroads "must be of a national character, and the regulation can only appropriately exist by general rules and principles which demand that it should be done by the Congress of the United States, under the commerce clause of the Constitution." The result of this decision was that existing state legislation regulating the railroads remained valid as to all transportation wholly confined to the state so legislating, but that, as to all commerce originating in one state or territory and passing into another, Congress alone had the power to regulate such commerce by statute.

Nor can the common law, out of which the statutes spring, be overlooked, because the Supreme Court early held: "Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally